LIBRARY
SUPREME COURT U S

Supreme Court of the United States

October 1955 Term

No. 72

FRANK COSTELLO,

Petitioner,

—vs.—

UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE A PETITION FOR ENLARGEMENT OF THE SCOPE OF REVIEW IN THE ORDER GRANTING CERTIORARI

and

PETITION FOR ENLARGEMENT OF THE SCOPE OF REVIEW IN THE ORDER GRANTING CERTIORARI

Morris Shilensky
Osmond K. Fraenkel
120 Broadway
New York 5, N. Y.

Joseph Leary Delaney
580 Fifth Avenue
New York 36, N. Y.
Attorneys for Petitioner

Supreme Court of the United States

October 1955 Term

No. 72

FRANK COSTELLO

Petitioner

—v.—

UNITED STATES OF AMERICA

MOTION FOR LEAVE TO FILE A PETITION FOR ENLARGEMENT OF THE SCOPE OF REVIEW IN THE ORDER GRANTING CERTIORARI

Petitioner, by his attorneys, moves the Court for leave to file the annexed petition for enlargement of the scope of review in the order granting certiorari.

The Court granted certiorari in this case on October 10, 1955 limited to one question, which was decided on March 5, 1956.

An additional question presented by the petition for certiorari was whether a criminal case may be submitted to the jury if the elements thereof have not been proved beyond a reasonable doubt or whether as the Court below held "the prosecution makes out a sufficient case to go to the jury, if the evidence would have been enough in a civil action". Judge Frank in his concurring opinion (221 F. 2d at 680) said: "Although, then, I concur in Judge Hand's opinion, I think it desirable that the Supreme Court consider the application of that ruling here."

In the Federal Reporter Advance Sheet of March 5, 1956 appeared Judge Frank's concurring opinion in *United States* v. *Castro*, 228 F. 2d 807 (decided January 5, 1956) wherein the same question was again discussed. There Judge Frank said: "I hope that, some day soon, the Supreme Court, because of the conflict in this area between this Circuit and some other Circuits, will decide what is the correct rule."

Petitioner therefore respectfully asks leave to file the annexed petition on the grounds therein stated.

Respectfully submitted,

MORRIS SHILENSKY
OSMOND K. FRAENKEL
JOSEPH LEARY DELANEY
Attorneys for Petitioner

Supreme Court of the United States

October 1955 Term

No. 72

FRANK COSTELLO,

Petitioner.

—vs.—

UNITED STATES OF AMERICA.

PETITION FOR ENLARGEMENT OF THE SCOPE OF REVIEW IN THE ORDER GRANTING CERTIORARI

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks that the order granting certiorari entered October 10, 1955 (350 U. S. 819) be amended to permit review of one of the other questions presented by the original petition for certiorari because of the following circumstances:

The concurring opinion of Judge Frank (221 F. 2d p. 680) discussed the rule in the Second Circuit as expressed by Judge Hand that even in a criminal case "the prosecution makes out a sufficient case to go to the jury, if the evidence would have been enough in a civil action" and added: "Although, then, I concur in Judge Hand's opinion, I think it desirable that the Supreme Court consider the application of that ruling here".

Since then, in *United States* v. *Castro*, 228 F. 2d 807 decided January 5, 1956 (contained in Advance Sheet of March 5, 1956), Judge Frank again (at p. 810) questioned the correctness of the rule in the Second Circuit and noted that it was at variance with the rule in several other circuits to the effect that a case should not go to the jury unless the evidence would justify a finding of guilt, beyond a reasonable doubt.[1] He there said: "I hope that, some day soon, the Supreme Court, because of the conflict in this area between this Circuit and some other Circuits, will decide what is the correct rule."

Petitioner discussed this question at pages 20 to 22 of his original petition for certiorari in connection with question 5 then presented by him[2] and argued its application to this "net worth" case particularly as it related to the "starting point" at pages 14 to 16 of the petition.

This court said in *Holland* v. *United States*, 348 U. S. 121 at page 132: "an essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets."

The opening cash net worth as claimed in this case by the Government as of January 1, 1946, the beginning of the first of the four prosecution years, was *zero*. The

---

[1] Citing cases from the Third, Fifth, Eighth, Ninth, Tenth and District of Columbia Circuits (see note 4, p. 809).

[2] This reads as follows:

> 5. Does the government make out a case for submission to the jury under the net worth-expenditures theory unless every element of the case is proved beyond a reasonable doubt?" (Petition for Certiorari, p. 3.)

Government arrived at this unrealistic conclusion by showing that petitioner and his wife had spent $202,865.81 in excess of reported gross income and known resources during the years *before* the prosecution years. No starting point can be established by showing that a defendant and his wife spent several hundred thousand dollars more in pre-prosecution years than the Government's calculations of all their assets and income. All that such a showing establishes is that the calculations of prior assets and income were incorrect in that the Government did not locate all the assets or that defendant or his wife had incorrectly reported income in the pre-prosecution years.

There was no evidence presented at the trial that defendant's wife did not have cash assets *of her own* at the beginning of 1946; only that "she had no separate income beyond what was credited to her in 1946" (221 F. 2d at 672). Yet the tax deficiency of the defendants for the years 1948 and 1949 which amounted to $28,532.46 were based largely on expenditures of defendant's wife.[3]

Therefore, the Government's case, based on a *zero* starting point is not tenable.

Moreover, we have here the finding by the Court of Appeals that "the evidence did not justify a verdict based

---

[3] Exhibit 362; Record, Vol. VI p. 33.

[4] Recently John H. Mitchell, who at the time of writing an article entitled "The Net Worth Doctrine" was the chief of the Criminal Section of the Tax Division of the Department of Justice, stated, "The wife's estate can not be ignored in establishing the opening net worth. Any assets belonging to the wife must be accounted for to exclude the possibility that they were not used in the acquisition of other assets during the prosecution." 14th N. Y. U. Institute Federal Taxation (1956) 1345, 1363.

upon the assumption that on January 1, 1946, there had not been a reserve of more than $30,000; or indeed of more than $40,000" (221 F. 2d at p. 673).

Thus the zero cash starting point contended for by the Government and so submitted to the jury was rejected by the Court of Appeals, as unsupported by the evidence and the conviction for 1947 was reversed.[5] But presumably, though inconsistently, the Court of Appeals in adherence to its rule, referred to above, did not test the sufficiency of the evidence to ascertain whether it supported a conviction for the years 1948 and 1949 beyond a reasonable doubt. An examination would have disclosed that the evidence did not support the conviction since the starting point was incorrect.

The philosophy that evidence to sustain guilt must be beyond a reasonable doubt in criminal cases is deeply ingrained in our system. To say that this is satisfied merely by an instruction to the jury, which is what the Second Circuit holds, is to eliminate all distinctions between a civil case and a criminal case insofar as the judge's functions are concerned. The court below has thus in effect established a rule that evidence in criminal cases need not be as strong as in some civil cases, such as denaturalization, fraud, constructive trust, and patent cases where the test is more than a mere preponderance of evi-

---

[5] The jury found the defendant not guilty for 1946, the first prosecution year. The Court of Appeals acquitted the defendant of the count for 1947 involving a claimed deficiency in tax of $22,563.13 and left standing the conviction for 1948 and 1949, involving $13,786.02 and $14,746.44 in claimed tax deficiencies for the respective years (Record 1595a).

dence (see cases cited in Judge Frank's opinion *United States* v. *Castro*, 228 F. 2d at p. 809).

As already noted, other Circuits do not agree with the rule applied here by the Second Circuit. Therefore, this Court, it is respectfully submitted, should decide this issue now, not only because of the conflict in Circuits, but also in the interest of resolving an important question in the administration of federal criminal law. The instant case presents the question directly and because the record is here, there will be no delay in the presentation of the point.

The impact of the rule laid down by the Court of Appeals on this subject (which this Court has so far refused to review) has now become greater by reason of this Court's ruling that there can be no scrutiny of the action of the grand jury. The net effect, therefore, is that a grand jury may give lip service to the constitutional protection by finding an indictment without any evidence at all and that a petit jury may give lip service to the requirement of the criminal law that a defendant cannot be convicted except on evidence proving guilt beyond a reasonable doubt. But no court will review to determine whether or not there was any evidence before the grand jury and the judges in the Second Circuit will not consider whether the quality of the evidence before the petit jury justified the submission of the case to the jury for its speculation. Defendants in other Circuits at least have the protection of the trial judge if the evidence does not justify conviction and, if necessary, the scrutiny of the Court of Appeals.

Petitioner, therefore, respectfully asks that the Court grant this application and take for decision the question

presented in Judge Frank's concurring opinion in this case.

Respectfully submitted,

MORRIS SHILENSKY
OSMOND K. FRAENKEL
JOSEPH LEARY DELANEY
Attorneys for Petitioner

MORRIS SHILENSKY, one of counsel for petitioner, hereby certifies that the above application is made in good faith and not for the purpose of delay and is restricted to the grounds specified in Rule 58, subd. 2.

Dated: New York, N. Y.
March 28, 1956

MORRIS SHILENSKY